

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE TERRELL GREENE,

Defendant-Appellant.

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UNPUBLISHED

January 31, 2006

No. 255968

Wayne Circuit Court

LC No. 03-009542-01

Before: Sawyer, P.J., and Wilder and H. Hood\*, JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to eleven to eighteen years in prison for the armed robbery conviction, eleven to twenty years in prison for the first-degree home invasion conviction, and two years in prison for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's first issue on appeal is that he was denied his right to a fair trial when the prosecutor improperly shifted the burden of proof during his rebuttal argument. We disagree.

Defendant failed to properly preserve his first issue on appeal by objecting to the prosecutor's alleged burden shifting comments at trial. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). This court reviews an unpreserved claim of prosecutorial misconduct for a plain error which affected the defendant's substantial rights. Reversal is merited only if plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A reviewing court examines the record to evaluate the questioned prosecutorial remarks in context of the evidence, issues and defense arguments. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice*

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

(*On Remand*), 235 Mich App 429, 438; 597 NW2d 843 (1999). A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). The aforementioned implication indirectly focuses the jurors' attention upon the defendant's failure to testify, and thus, violates the defendant's Fifth Amendment protections. *Id.* However, a prosecutor is entitled to fairly respond to issues raised by a defendant. *People v Jones*, 468 Mich 345, 352-353 n 6; 662 NW2d 376 (2003). Under the "fair response" doctrine, unless the prosecutor's comments burden the defendant's right not to testify, or shift the burden of disproving an element of the offense to the defendant, the comments are not improper. *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995).

Here, defense counsel argued that the victim's identification of defendant at the lineup was shaky. Defense counsel attempted to elicit testimony from Sergeant Herbert Maxwell and the victim that the victim only said defendant looked "familiar" when he identified defendant. Furthermore, during his closing argument, defense counsel implied that it was the prosecutor's burden to produce Oakland County jail staff to establish that their lineup notes, which stated "[n]umber two looks like or looks familiar," were incomplete. Defense counsel did this despite the fact that both Maxwell and the victim testified that the lineup notes were incomplete and the victim positively identified defendant as the individual who dragged him to the store at gunpoint and robbed the store. During rebuttal, the prosecutor responded by stating:

Counsel wants to speculate about what Oakland County was doing that day and whatever else. I want you to focus on what you heard. The defendant has the burden in this case. Let's be clear about that. He has the same rights as the People. He has the same opportunity as the People.

And if he thought there was evidence out there that the victim in this case said something different in the lineup, he would have brought any witnesses he wanted to, but that was not done. So be cautious as to what you look at in this case and be cautious as to what evidence [sic] shows.

We conclude that the prosecutor's questioned rebuttal comments, taken in context, do not burden the defendant's right not to testify, or shift the burden of disproving an element of the offense to defendant because the comments are merely a response to defense counsel's implication that the prosecutor bore the burden to establish that the lineup notes were incomplete. Thus, the questioned prosecutorial comments are not improper. *Fields, supra*, pp 112-113.

Moreover, any confusion or prejudice that might have been created by the comments was remedied by the trial court's instructions that the "prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. . . . Every defendant has an absolute right not to testify," and the jury "must not consider the fact that [defendant] did not testify." Therefore, the prosecutor's comments did not deny defendant a fair and impartial trial, let alone amount to plain error, and thus, the comments did not amount to prosecutorial misconduct. *Watson, supra*, p 586.

Defendant's second issue on appeal is that he was denied his right to the effective assistance of counsel when his counsel failed to object to the victim's identification testimony

and the aforementioned alleged burden shifting rebuttal comments by the prosecutor. We disagree.

When reviewing a claim of ineffective assistance of counsel, when an evidentiary hearing is not previously held, this Court's review is limited to the facts contained on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of constitutional law, this Court reviews the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant's claim, that he was denied his right to the effective assistance of counsel when his counsel failed to object to the prosecutor's aforementioned burden-shifting rebuttal argument, fails. As discussed, *supra*, the prosecution's questioned rebuttal comments were not improper. Therefore, any objection would have been futile, and thus, defense counsel did not render ineffective assistance by failing to object to the comments. *Ackerman, supra*, p 455. Furthermore, even if it were found that the prosecutor's rebuttal comments were improper and should have been objected to, no prejudice resulted from defense counsel's failure to object given the trial judge's instructions to the jury regarding the burden of proof. Therefore, ineffective assistance of counsel has not been established. *Toma, supra*, pp 302-303.

Likewise, defendant's claim, that he was denied his right to the effective assistance of counsel when his counsel failed to object to the victim's identification testimony, fails. "If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1988). A preliminary examination identification can be impermissibly suggestive. *Id.* However, even if an identification is found to be suggestive, the identification is not constitutionally defective if a court determines that an independent basis for identification exists. *Id.* at 304-305. When determining if an independent basis exists, a court should consider:

1. Prior relationship with or knowledge of the defendant.
2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act.
3. Length of time between the offense and the disputed identification.

4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.

5. Any previous proper identification or failure to identify the defendant.

6. Any identification prior to lineup or showup of another person as defendant.

7. The nature of the alleged offense and the physical and psychological state of the victim.

8. Any idiosyncratic or special features of defendant. [*People v Gray*, 457 Mich 107, 115-116; 577 NW2d 92 (1998).]

Here, it is likely that the preliminary examination identification was suggestive because defendant was dressed in casual clothes sitting at the defense table next to his attorney who was dressed in a suit. However, during the course of defendant breaking into the victim's apartment, dragging him down to the store and robbing the store, the victim had an opportunity to view defendant's general stature and physical characteristics from a close distance, and even had an opportunity to see defendant's face on two separate occasions when defendant pulled the stocking away from his face. Furthermore, prior to the preliminary examination, the victim attended a lineup and identified defendant as the man involved in the incident. Therefore, we conclude that the prosecution established by clear and convincing evidence that the victim's identification had a sufficiently independent basis. See, *Gray, supra*, p 124; *Colon, supra*, p 305. Thus, any objection to the identification testimony would have been futile, and therefore, defense counsel did not render ineffective assistance by failing to object to the identification testimony. *Ackerman, supra*, p 455.

Defendant's final issue on appeal is that the trial court improperly used "factual findings or conclusions that were not proved to a jury beyond a reasonable doubt and were inconsistent with the jury's verdict" when it scored defendant's sentencing guidelines range. We disagree.

This Court reviews a sentencing court's scoring of a defendant's guidelines to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Furthermore, whether *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), applies to the instant case is a question of law that is reviewed de novo by this Court. *People v Spanke*, 254 Mich App 642, 645-646; 658 NW2d 504 (2003).

The sentencing guidelines apply to any enumerated felony committed on or after January 1, 1999. *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005); MCL 769.34(2). Under the sentencing guidelines act, a court must impose a sentence in accordance with the appropriate sentence range. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001); MCL 769.34(2). Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); MCL 769.34(10). "Generally, to determine a minimum sentence range under the legislative

sentencing guidelines, the sentencing court must first determine the offense category.” *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004); MCL 777.21(1)(a). “The sentencing court must then determine which offense variables (OV) are applicable, score those variables, and total the points to determine the offender's offense variable level.” *Id.* “The sentencing court also scores all prior record variables [(PRV)].” *Id.*; MCL 777.21(1)(b). “The offender's [OV] score and [PRV] score are then used with the sentencing grids to determine the recommended minimum sentence range under the guidelines.” *Id.*; MCL 777.21(1)(c).

Defendant argues that the trial judge should not have scored fifteen points for OV8, ten points for OV9, fifteen points for OV10, or twenty-five points for OV13. In pertinent part, under OV8, fifteen points should be scored if “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38. In pertinent part, under OV9, ten points should be scored if “2 to 9” people were “placed in danger of injury or loss of life as a victim.” MCL 777.39. In pertinent part, under OV10, fifteen points should be scored if “[p]redatory conduct was involved.” MCL 777.40. Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40. In pertinent part, under OV13, twenty-five points should be scored if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43. Defendant specifically argues that the scoring of the aforementioned variables was improper because the trial judge used “factual findings or conclusions that were not proved to a jury beyond a reasonable doubt, and were inconsistent with the jury’s verdict,” and therefore, violated *Blakely*, *supra*.

In *Blakely*, *supra*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's sentence on the basis of facts that were not reflected in the jury’s verdict or admitted by the defendant. However, our Supreme Court concluded that the limitation imposed on factual findings by *Blakely*, *supra*, only applies to determinate sentencing schemes, and thus, does not affect the indeterminate sentencing scheme embodied in the Michigan sentencing guidelines. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Furthermore, we conclude that the United States Supreme Court's recent decision in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), which held that the Federal Sentencing Guidelines were subject to a *Blakely* analysis and that any fact, other than a prior conviction, must be admitted by the defendant or proved to a jury beyond a reasonable doubt, does not affect the Michigan guidelines because the Federal Sentencing Guidelines also involve a determinate sentencing scheme. Therefore, factual findings for sentencing purposes require a mere preponderance of the evidence. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). Information relied upon may come from several sources, “including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.” *Id.* at 712.

The record establishes that the victim was forced from his home in his underwear at gunpoint, thrown in his van and driven to the store at gunpoint, all the while being continuously threatened that he was going to be shot. Furthermore, the record suggests that the victim was targeted in his home because defendant knew where he lived and that he would have the keys and the security code to the store where he was employed. Moreover, the record establishes that

at least two people were placed in danger by defendant's actions (the victim and Marcus Hyman). Finally, the record establishes that the instant offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person" because defendant's presentence investigation report establishes that defendant has been convicted of three armed robbery offenses during the preceding two years. Therefore, the trial court did not abuse its discretion when it scored fifteen points for OV8, ten points for OV9, fifteen points for OV10, and twenty-five points for OV13. MCL 777.38; MCL 777.39; MCL 777.40; MCL 777.43. The trial court properly scored defendant's sentencing guidelines and properly sentenced defendant to a minimum sentence that fell within the applicable range, *Morson, supra*, p 255, and thus, this Court must affirm defendant's sentences, *Kimble, supra*, p 309; MCL 769.34(10).

Affirmed.

/s/ David H. Sawyer  
/s/ Kurtis T. Wilder  
/s/ Harold Hood